# In the Supreme Court of the United States.

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ALBERT H. BURT
AND
JOSEPH J. SINDELE,
PLAINTIFFS IN ERROR,
*vs.*
WILLIAM W. SMITH,
DEFENDANT IN ERROR.

October Term, 1905.
No. 67.

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(As Plaintiffs in Error were the Plaintiffs, and Defendants in Error the defendants, they will, for brevity, be styled "Plaintiffs" and "Defendants," in this brief.)

The only jurisdictional question stated in Defendant's Brief was that the Federal question had not been presented by pleading or exception (Defendant's Brief, Point 1, Page 13.)

The answer is given in Plaintiffs' Brief, pp. 41-43, that the former judgment was alleged in the complaint herein as a judgment on the merits.

It was also alleged in the answer (Record, first par., p. 9), and was in evidence (Record, pp. 27-65). The *facsimiles* of the packages upon which the opinion based its decision are a part of the Record of that judgment, and are shown at opp. pp. 38,56. The authorities in this court are cited

in Plaintiffs' Brief to the effect that if a Federal question appears in the Record and was actually decided or necessarily involved in the decision as made by the State Court, this Court has jurisdiction; and this even though the State Court ignored and did not refer to the previous judgment of the Federal Court. (Plaintiffs' Brief, Fourth Head, pp. 41-43.)

Among the questions suggested on the argument were the following:

Whether the questions of probable cause and infringement were not separate and independent questions, and whether the Court of Appeals did not decide the question of probable cause as such a separate question; and if so, whether that was not alone sufficient to warrant its judgment.

Whether the Court of Appeals' decision does fail or refuse to give effect to the adjudication of the previous judgment.

The thing chiefly discussed was whether as matter of law or logic that Court *could* have decided probable cause without deciding infringement.

Plaintiffs' counsel still regards that question as immaterial, because the opinion states plainly the decision and its grounds, and that it holds there was probable cause "because" it had found infringement.

I.

The question of "probable cause" cannot be said to be wholly *separate* from the question of infringement, because this is an action for a wrongful prosecution of an injunction suit *for infringement.*

If the judgment there had determined that there *was* infringement, it would thereby have determined that there *was* probable cause and barred this suit.

In other words, the question of probable cause *is* whether

Defendant had reasonable and probable cause to believe he could maintain the action *for infringement;* and when the Court of Appeals determined in this action the question of infringement in favor of Defendant, it necessarily determined that he had probable cause to sue for infringement. It assigns no other ground for its decision, and presumably it had no other, and this was obviously sufficient.

It is not admitted, however, that it is necessary for the Court or for counsel to solve the question as to whether those questions *could* be decided as wholly separate questions. The only question on this point is to ascertain what that Court *did* decide.

The Plaintiffs are in no way responsible for the decision or its grounds, but have a right to ask this Court to accept the statement of that Court as to the grounds of its decision.

It has been uniformly held that this Court will and must ascertain for itself from the Record—including the pleadings, the decree, and the *opinion*—what questions were, in fact, decided by or involved in the decision of the Court below.

Southern Pac. R. R. Co., *vs.* U. S., 168, U. S. 44-45, 49-52.

Baker *vs.* Cummings, 181, U. S. 117.

Nat. F'dry Co. vs. Oconto W. S. Co., 183 U. S., 213, 234.

This appears to be a rule of necessity, otherwise the constitutional provision would fail of its purpose. The order (or decree) of the Court of Appeals shows nothing but the fact of reversal and affirmance of the non-suit. (Record, p. 115.)

II.

There does not appear to be any room for doubt that the Court of Appeals made its decision solely on its conclusion that there was infringement, and therefore probable cause. If the judgment in the injunction suit had determined that there was infringmeent this action would never have been

begun; or if begun that judgment would have barred it. Hence there is some legal connection between those questions—such a connection that the decision of infringement necessarily determines that there *was* probable cause; and, in that way that opinion proceeds.

The preliminary argument is of the question of infringement; and finally the opinion states that it decides that there was probable cause, "*because*" it finds that there was infringement.

*There is no other ground even suggested in the opinion.*

How *can* it be ascertained here that if the Court of Appeals had found directly to the contrary, to wit, non-infringement, it would still have held probable cause as matter of law. And upon what ground can the statement of the opinion that it holds the one "*because*" it finds the other, be discredited.

If the opinion does not base the conclusion of probable cause solely on its finding of infringement, why does it say that, and why does it not say something else.

The suggestion has been made that the Court *could* have held probable cause without holding infringement, and that the opinion may be so interpreted.

But the language of the opinion when it says that the Plaintiffs' evidence shows probable cause "*because*" it shows that Plaintiffs' drops and packages infringed Defendants, bars this inference. *There is no ambiguity.*

It says "because," because it means "because." This Court cannot substitute another word for "because."

And the former judgment had determined that there was no infringement.

This, it is believed, is judicially the end of the argument on this point.

The Court of Appeals *must* be held to have stated accurately and truthfully in its opinion that it held probable cause *because* it found infringement.

And it is certain that that question of infringement *was not open to inquiry* in this action, *because of the former judgment.*

What that Court *might* have done or said is not open for consideration or speculation because it has plainly stated the ground of its decision.

Because, however, that question was much referred to on the argument, it will be considered briefly.

III.

*Upon this Record,* it is believed, there *was* no legal way for the Court of Appeals to accept and regard the former judgment, and *upon the same facts* hold probable cause as conclusion of law.

That judgment determined once for all that *the same facts,* to wit, the drops and packages, did not evidence or establish infringement, but *did evidence and establish the contrary.* The suggestion is that the trial Court or any Appellate Court might, in *this* action, have held as matter of law that *the same facts* tended to give *Defendant* probable cause to believe that they were an infringement, and that he did honestly so believe.

This apparently involves a paradox, to wit, that *the same facts* evidence and conclusively establish to one Court non-infringement, while to another Court they evidence infringement instead of non-infringement, and warrant it in holding that they furnished to the Defendant reasonable and probable cause to believe they were an infringement. If so, how did the same drops and packages evidence and establish non-infringement in the former action?

These propositions could only be reconciled in case mistake or misinformation of the facts or the law had been alleged and proved; and in case such misinformation were a defense on probable cause.

Mistake of law is not such defense in the State of New

York, but is only evidence on *malice*. Probable cause may be founded on misinformation of facts, but not of law.

Hazzard *vs.* Flury, 120 N. Y., 223.

See citations, Plaintiffs' Brief, p. 26.

The conclusive presumption of law is that every person knows the law. Ignorance of the law is not a defense in actions on contract, for torts, or even crimes.

But if it were competent as to probable cause, there were no allegations or evidence that Defendant stated the facts fully and fairly to counsel and was advised in good faith that he had probable cause to bring the injunction suit. And the stipulation for judgment absolute is, in effect, that there is no defense outside this Record. Hence the legal presumption that Defendant knew the law remained.

But again, *the end of this argument* is that the opinion positively says something else, but does not say this.

*Finally.*

Plaintiffs' counsel respectfully requests the Court to examine his brief in chief, and ventures to do this because it is a full and careful argument, and was not presented at the oral argument, because of the questions as to jurisdiction.

It is submitted that there can be no doubt of the jurisdiction; and that after eight years of litigation for a cause of action to which it is now admitted there is no defense on the merits, the Plaintiffs may earnestly ask that the Court fully possess itself of the facts and the law, and award them judgment.

Respectfully submitted,

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